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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

**[Docket No. 161025999-7662-02]**

**RIN 0648-BG42**

**Fisheries of the Northeastern United States; Mid-Atlantic Unmanaged Forage  
Omnibus Amendment**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS partially approves and implements through regulations measures included in the Mid-Atlantic Unmanaged Forage Omnibus Amendment, as adopted by the Mid-Atlantic Fishery Management Council and approved by NMFS on June 13, 2017. The purpose of this action is to prevent the development of new, and the expansion of existing, commercial fisheries on certain forage species until the Council has adequate opportunity and information to evaluate the potential impacts of forage fish harvest on existing fisheries, fishing communities, and the marine ecosystem. This final rule implements an annual landing limit, possession limits, and permitting and reporting requirements for Atlantic chub mackerel and certain previously unmanaged forage species and species groups caught within Mid-Atlantic Federal waters; allows vessels to transit Mid-Atlantic Federal waters with forage species caught in other areas; and identifies measures that can be revised through a future framework adjustment.

**DATES:** This rule is effective [*insert date 30 days after date of publication in the FEDERAL REGISTER*].

**ADDRESSES:** The Council prepared an environmental assessment (EA) for the Mid-Atlantic Unmanaged Forage Omnibus Amendment that describes the Council's preferred management measures and other alternatives considered and provides a thorough analysis of the impacts of the all alternatives considered. Copies of the Mid-Atlantic Unmanaged Forage Species Omnibus Amendment, including the EA, the Regulatory Impact Review, and the Regulatory Flexibility Act analysis are available from: Christopher Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 State Street, Dover, DE 19901. The supporting documents are also accessible via the Internet at:

- <https://www.regulations.gov/docket?D=NOAA-NMFS-2017-0013>
- <https://www.greateratlantic.fisheries.noaa.gov/regs/2017/April/17ForageOmnibusAmendmentpr.html> or
- <http://www.mafmc.org/actions/unmanaged-forage>.

Copies of the small entity compliance guide prepared for this action are available from John K. Bullard, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930-2298, or available on the internet at:

<https://www.greateratlantic.fisheries.noaa.gov/sustainable/species/forage/index.html>.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to the

Greater Atlantic Regional Fisheries Office and by e-mail to  
*OIRA\_Submission@omb.eop.gov* or fax to (202) 395-5806.

**FOR FURTHER INFORMATION CONTACT:** Douglas Christel, Fishery Policy  
Analyst, (978) 281-9141, fax (978) 281-9135.

**SUPPLEMENTARY INFORMATION:**

**Background**

On August 8, 2016, the Council adopted final measures under the Mid-Atlantic Unmanaged Forage Omnibus Amendment. On November 23, 2016, the Council submitted the amendment and draft EA to NMFS for preliminary review, with final submission of the draft amendment and EA on March 20, 2017. NMFS published a Notice of Availability in the *Federal Register* on March 28, 2017 (82 FR 15311), informing the public that the Council had submitted this amendment to the Secretary of Commerce for review and approval. NMFS published a proposed rule that included implementing regulations on April 24, 2017 (82 FR 18882). The public comment period for both the Notice of Availability and proposed rule ended on May 30, 2017.

The Council developed the Mid-Atlantic Unmanaged Forage Omnibus Amendment and the measures described in the proposed rule under the discretionary provision specified in section 303(b)(12) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801, *et seq.*; 1853(b)(12)). The objective of this action is to prevent the development of new, and the expansion of existing, commercial fisheries on certain forage species until the Council has adequate opportunity and information to evaluate the potential impacts of forage fish harvest on existing fisheries, fishing communities, and the marine ecosystem. The two primary

purposes of this action are to: (1) advance an ecosystem approach to fisheries management in the Mid-Atlantic through consideration of management alternatives that would afford protection to currently unmanaged forage species by regulating landings and/or possession of those species; and (2) consider management alternatives to address data collection and reporting of landings of currently unmanaged forage species. Details concerning the development of these measures are contained in the EA prepared for this action and summarized in the preamble of the proposed rule, and, therefore, are not repeated here.

### **Disapproved Measures**

#### *Designation of Bullet and Frigate Mackerel as Ecosystem Component (EC) Species*

The Magnuson-Stevens Act permits NMFS to approve, partially approve, or disapprove measures proposed by the Council based only on whether the measures are consistent with the fishery management plan, the Magnuson-Stevens Act and its National Standards, and other applicable law. Following the consideration of public comment and additional review of this action and supporting analysis, NMFS concluded that the inclusion of bullet and frigate mackerel as EC species is inconsistent with National Standard 2 of the Magnuson-Stevens Act regarding the use of best available scientific information.

The best available scientific information presented for this amendment does not support the proposed designation of bullet and frigate mackerel as forage for species managed by the Council. Because this action is an amendment to the Council's existing FMPs, the species that are included in the amendment must be a forage species and also must be linked to one or more FMP fisheries, either as prey for the managed species or as

bycatch in the managed fisheries. This is consistent with our understanding of Council intent, as documented in the March 2016 Fishery Management Action Team meeting summary. As a result, NMFS asserted that this amendment needed to establish a logical connection between the species proposed as forage and at least one managed species. During the development of this action and in the proposed rule, NMFS advised the Council and the public that bullet and frigate mackerel do not meet the criteria used to identify forage for species regulated by the Council.

Although the Council did not rely exclusively on the forage criteria identified by the Council's Scientific and Statistical Committee (SSC), as summarized in Table 5 of the EA, the forage criteria served as the initial foundation for evaluating species to include in this action. These criteria establish general parameters, including adult size, trophic level, and whether the species comprised a considerable portion of the diet of other predators, among other criteria, to determine whether a species is forage for another species. The adult sizes of bullet and frigate mackerel (20-24 inches (51-61 cm) total length) are larger than the size ranges identified for other forage species included in this action, which average 7 inches (18 cm) in total length. Thus, the adult sizes of bullet and frigate mackerel are more than double the forage fish size range recommended by the Council's SSC (1-10 inches (2-25 cm) total length). Bullet and frigate mackerel feed on most of the other forage species included in this amendment, confirming their higher trophic classification. This is inconsistent with the SSC's classification criteria that forage species are typically low to mid trophic level species that consume very small prey less than 1-inch long (2-2.5 cm), typically zooplankton and or small benthic invertebrates. While the amendment includes some information suggesting that these species are consumed by

large pelagic species such as tunas, billfish, and sharks, it is not clear what portion of the diet of these species that bullet and/or frigate mackerel represent. As a result, while bullet and frigate mackerel may be prey for large pelagic species, it is unknown whether they constitute forage for large pelagic species in the marine ecosystem, as defined by the SSC. Finally, even applying the lower forage thresholds used by the Council (*i.e.*, the presence of forage species in at least two stomach content samples over a 40-year period of NMFS surveys), there is no scientific evidence presented in this amendment that indicates bullet and frigate mackerel are forage for managed species. Thus, the best available scientific information does not support the classification of these species as forage for managed species, and NMFS determined that including them would be inconsistent with National Standard 2 of the Magnuson-Stevens Act.

Other criteria considered by the Council to classify forage species for this amendment include the presence of such species as bycatch in managed fisheries and the potential for commercial exploitation. While there is evidence that a small amount of bullet mackerel was caught with bottom trawl gear that resulted in the landings of species managed by the Council, the information and analysis indicate co-occurrence that is not necessarily indicative of systematic bycatch in those fisheries. Many unmanaged species co-occur with managed species, but that does not make them forage for the managed species or susceptible to routine bycatch in targeted fisheries for managed species. NMFS concluded that available information is not sufficient to suggest that bullet mackerel are systematically caught as bycatch in managed fisheries. With no dealer reported landings of bullet mackerel, and an average of less than 7,500 lb (3.4 mt) of frigate mackerel reported landed each year between 1996-2015, including several years when less than

1,000 lb (0.4 mt) was landed, there is limited information to support that these species are caught as bycatch in managed fisheries or will be subject to commercial exploitation at this time.

Finally, the best available information does not support the Council's determination that bullet and frigate mackerel should be classified as EC species based upon the National Standard Guidelines at 50 CFR 600.305. As defined in § 600.305(d)(11) and noted during the April 2016 Council meeting, EC species should not include target stocks that are caught for sale or personal use. However, the amendment includes evidence that bullet and frigate mackerel are caught and sold by commercial vessels and are retained for personal use as bait by recreational fisheries in Federal waters, creating competing interests and conflicts among user groups, both of which are criteria that could exclude consideration of bullet and frigate mackerel as EC species under the National Standard Guidelines. The Council could consider alternative mechanisms to protect and manage these and other similar species, such as little tunny/false albacore and bonito, for the benefits they provide to the marine ecosystem and important commercial and recreational fisheries within the Mid-Atlantic. This is consistent with the May 19, 2017, discussion by the Ecosystem and Ocean Planning Committee (EOPC). If the Council believes that these species require conservation and management, a small tuna FMP or a broader ecosystem based management action may be a more effective vehicle to manage these species than an amendment predicated on protecting forage for managed species. This would allow the Council to develop a management approach and measures that would reflect the unique role these species play in the marine ecosystem, and to better integrate the concerns of and impacts to the predominantly recreational fishery for these

species. Such an approach is supported by not only the EOPC, but also by members of the public commenting on this action.

## **Approved Measures**

### *1. Designation of Certain Mid-Atlantic Forage Species as Ecosystem Component Species*

This action designates the following forage species and species groups as EC species in all of the FMPs under the Council’s jurisdiction:

- Anchovies (family Engraulidae)
- Argentines (family Argentinidae)
- Greeneyes (family Chlorophthalmidae)
- Halfbeaks (family Hemiramphidae)
- Herrings and Sardines (family Clupeidae)
- Lanternfishes (family Myctophidae)
- Pearlsides (family Sternoptychidae)
- Sand lances (family Ammodytidae)
- Silversides (family Atherinopsidae)
- Cusk-eels (order Ophidiiformes)
- Atlantic Saury-*Scomberesox saurus*
- Pelagic Mollusks (except Sharptail Shortfin Squid)
- Copepods, Krill, Amphipods, and Other Species Under One Inch as Adults

The Magnuson-Stevens Act contains no requirements to designate EC species. To minimize confusion and reflect the purpose of this action to manage forage species, these species will be collectively referred to as “Mid-Atlantic forage species” for the remainder of this preamble discussion and in the final regulatory text.



## *2. Permit and Reporting Requirements*

This action requires any commercial vessel, operator, or dealer that lands or sells Mid-Atlantic forage species and Atlantic chub mackerel to comply with existing Federal permit and reporting requirements. Any commercial fishing vessel that possesses, lands, or sells Mid-Atlantic forage species or chub mackerel caught in Federal waters from New York through Cape Hatteras, North Carolina (an area referred to as the “Mid-Atlantic Forage Species Management Unit” below and in the regulations), must be issued a valid commercial fishing vessel permit issued by the Greater Atlantic Regional Fisheries Office (GARFO). Any commercial vessel operator fishing for or possessing these species in or from the Mid-Atlantic Forage Species Management Unit must obtain and retain on board a valid operator permit issued by GARFO. Similarly, a seafood dealer purchasing and selling these species must obtain a valid commercial seafood dealer permit issued by GARFO.

Vessel operators and dealers are required to report the catch and sale of these species and species groups on existing vessel trip reports (logbooks) and dealer reports, respectively. NMFS and Council staff prepared a species identification guide to help vessel operators and dealers differentiate among these forage species and identify the codes needed to accurately report these on vessel logbooks and dealer reports. We will send this guide to all vessels that landed in Mid-Atlantic ports during 2016 and make it available on both the GARFO and Council websites (see ADDRESSES) and through your local NMFS port agent office (see <https://www.greateratlantic.fisheries.noaa.gov/sed/portagents/portagents.html>).

The permit and reporting requirements mentioned above for vessels, operators, and dealers fishing for, possessing, and purchasing chub mackerel are effective through December 31, 2020, unless overwritten by another Council or NMFS action. This is because the Council is currently developing potential long-term measures and assembling the scientific information necessary to consider formally integrating chub mackerel as a stock in the fishery managed under the Atlantic Mackerel, Squid, and Butterfish FMP.

### *3. Annual Landing Limits*

This action sets an annual landing limit of 2.86 million lb (1,297 mt) for Atlantic chub mackerel. All landings of chub mackerel in ports from Maine through North Carolina will count against the annual landings limit. NMFS will close the directed fishery for chub mackerel in the Mid-Atlantic Forage Species Management Unit once the Regional Administrator determines that 100 percent of the chub mackerel annual landing limit has been harvested. After the closure of the directed fishery, vessels would be subject to the chub mackerel incidental possession limit described below. As in the case for the permit and reporting requirements, the chub mackerel annual landing limit is effective through December 31, 2020, unless overwritten by a future Council or NMFS action.

### *4. Possession Limits*

This action establishes a 1,700-lb (771-kg) combined possession limit for all Mid-Atlantic forage species (see the list of EC species listed above) caught within the Mid-Atlantic Forage Species Management Unit. Initially, commercial vessels are not subject to a possession limit for chub mackerel. However, once the chub mackerel annual landing limit is harvested, NMFS will implement a 40,000-lb (18,144-kg) chub mackerel

possession limit in the Mid-Atlantic Forage Species Management Unit. As in the case for the annual landing limit, the chub mackerel incidental possession limit will expire on December 31, 2020, unless overwritten by a future Council or NMFS action.

#### *5. Transit Provision*

This action allows a vessel issued a Federal commercial fishing permit from GARFO that possesses Mid-Atlantic forage species and chub mackerel in excess of the proposed possession limits to transit the Mid-Atlantic Forage Species Management Unit in certain circumstances. The following three conditions must be met to transit through the management unit: (1) Forage species were harvested outside of the Mid-Atlantic Forage Species Management Unit; (2) the vessel lands in a port that is outside of the Mid-Atlantic Forage Species Management Unit (*i.e.*, north of New York or south of Cape Hatteras, North Carolina); and (3) all gear is stowed and not available for immediate use. The transiting provision for vessels possessing chub mackerel is effective through December 31, 2020, unless overwritten by a future Council or NMFS action.

#### *6. Administrative Measures*

This action allows the Council to modify the list of EC species, annual landing limits, and possession limits for Mid-Atlantic forage species and chub mackerel through a framework adjustment to applicable FMPs rather than through an amendment to these FMPs. Although the preamble of the proposed rule did not indicate that the list of EC species could be modified through a framework action, the proposed regulations did indicate that the list of Mid-Atlantic forage species (the same as the EC species listed above) could be modified in a framework action.

Under this action, the Council establishes a policy that requires use of an experimental fishing permit (EFP) to support any new fishery or the expansion of existing fisheries for Mid-Atlantic forage species. The Council would consider the results of any experimental fishing activity and other relevant information before deciding how to address future changes to the management of fisheries for Mid-Atlantic forage species. Pursuant to existing regulations at § 648.12, the Regional Administrator already consults with the Council's Executive Director before approving any exemption under an EFP request.

### **Comments and Responses**

During the public comment periods for the Notice of Availability and the proposed rule for this amendment, we received 11,519 comments from 11,510 individuals. This included 11,484 form letters from Pew Charitable Trusts; comments from representatives of three commercial fishing entities/groups (Seafreeze Ltd., Lund's Fisheries Incorporated, and the Garden State Seafood Association (GSSA)); comments from three environmental organizations (Pew Charitable Trusts, Wild Oceans, and the Audubon Society); and comments from the Office of Management and Budget. Two individuals expressed general opposition to the rule, while 11,506 individuals supported the action and 11 individuals supported some, but not all of the proposed measures. The following discussion summarizes the issues raised in the comments that were relevant to this action and associated NMFS's responses. Please note that, pursuant to section 304(a)(3) of the Magnuson-Stevens Act, when NMFS considers the responses to comments, NMFS may only approve or disapprove measures proposed in a particular fishery management plan,

amendment, or framework adjustment, and may not change or substitute any measure in a substantive way.

### **General Comments**

*Comment 1:* One individual expressed disappointment that the Council waited six years to protect forage species, indicating that the Council should have acted sooner.

*Response:* We are satisfied with the amount of time that the Council took to develop this action, and contend that the measures implemented by this final rule will provide meaningful protection to important forage species in the Mid-Atlantic. The Council identified the need to protect forage species as part of its strategic planning and visioning process in 2011, and initiated this action in 2014, shortly after receiving guidance about how to manage forage species from its SSC. Because this was the first management action to specifically manage forage species in the Atlantic Ocean, the Council conducted extensive outreach to solicit public input during the development of this action. This action represents proactive steps by the Council to protect previously unmanaged forage species and prevent the initiation or further development of commercial fisheries on these species as it collects information on the importance of these species to fisheries communities and the ecosystem.

*Comment 2:* One individual was concerned that the proposed measures would not become effective until 2020.

*Response:* The comment is incorrect; all measures approved in this final rule are effective on [insert date 30 days after date of publication in the *FEDERAL REGISTER*]. As noted above, the Atlantic chub mackerel measures will expire on December 31, 2020, three years after implementation, to incentivize the Council to develop long-term

management measures to formally integrate this species into the Atlantic Mackerel, Squid, and Butterfish FMP.

*Comment 3:* Two individuals were concerned that climate change, including ocean acidification, will destroy fish habitat and negatively impact forage fish, sea birds, and marine mammals, with one individual suggesting the Environmental Protection Agency (EPA) should protect our air and water.

*Response:* Recent NMFS studies recognize that certain species are more vulnerable than others to climate change and associated effects to habitat. While stock assessments and management measures can consider the impacts of climate change, NMFS is not authorized to regulate the sources of air and water pollution referenced in these comments. The EPA develops regulations and policies aimed at reducing air and water pollution.

*Comment 4:* One individual suggested that forage fish should be limited to processing as food, not fish meal or fish oil.

*Response:* Because the Council did not impose any restrictions on the use or processing of forage species in this action, NMFS does not have the authority to impose such restrictions through this final rule.

*Comment 5:* Seven individuals, along with 11,484 form letters from Pew, expressed general support for this action. Three individuals indicated that forage fish are a vitally important component to the ecology of our oceans through their role of energy transferors and as the primary food source for larger fish, marine mammals, and humans. A separate comment from Pew indicated that forage fish are the bedrock of coastal economies, jobs, recreation, and seafood, and that protecting them through this action is an

important step toward ecosystem based fisheries management. The Audubon Society commented that seabirds depend on forage species, especially small, schooling fish that are protected by this amendment. They provided a list of 15 seabird species that rely upon forage fish for 20 percent or more of their diet. The 11,484 Pew form letters indicated that, due to reductions in the availability and catch rates of other stocks, vessels will target unmanaged species, which would negatively affect those species and predators of those species. Similarly, one individual indicated that this amendment would help prevent the commercial fishing industry from fishing down the food web.

*Response:* We agree that forage species are an integral part of the marine ecosystem, and that excessive catch of forage species will have negative impacts not only on predators such as fish, sea birds, and marine mammals, but also on fishing communities that rely upon predators of forage species for important commercial and recreational fisheries. That is why the Council initiated this action as part of its efforts to integrate ecosystem approaches to fisheries management. We recognize that restrictions in targeted fisheries potentially could increase fishing effort on other unmanaged species, such as the forage species listed in this action. By preventing the creation of new or expansion of existing commercial fisheries on previously unmanaged forage species, this action minimizes the risk of fishing down the food web.

*Comment 6:* One individual recommended that we use caution when allowing additional fishing to occur on forage species until we know more about the impacts of fishing on these species. Another individual indicated that NMFS must achieve a sustainable balance between species regeneration and harvest of forage fish.

*Response:* One of the primary purposes of this action is to maintain recent catch levels until we can collect additional data on the catch and landings of these previously unmanaged forage species. The data collected through the vessel logbook and dealer reporting requirements implemented by this action will help the Council make more informed decisions in the future regarding the appropriate levels of catch for such species. Further, this action adopts a policy that requires use of an EFP and subsequent Council review before considering any new fisheries or expansion of existing fisheries for Mid-Atlantic forage species.

*Comment 7:* One individual was concerned that by managing these species, fishermen would be held responsible for declines in abundance. This individual suggested that there are no plans to examine how environmental factors affect forage species or predators, and that this action does not assess the impacts of factory ships on the ecosystem, only impacts of small boats.

*Response:* We disagree with this commenter. The EA prepared for this action includes a cumulative effects analysis (Section 7.6 of the EA), as required by the National Environmental Policy Act (NEPA) and the Council on Environmental Quality regulations. This analysis considers the impacts of non-fishing activities such as climate change, point and non-point source pollution, shipping, dredging, storm events, and other factors on the physical and biological dimensions of the environment. The impacts of these non-fishing activities are considered in the development of all fishery management actions. Further, environmental factors along with mortality resulting from fishing activities are considered when developing a stock assessment and determining the appropriate levels of catch for managed species. Depending on the species, fishing may not be the primary source of



mortality, and this will influence the measures necessary to sustain that species. This action will help collect data to help determine the scale of fishing mortality on these forage species should the Council determine that these species require conservation and management in the future. Finally, while the EA does not explicitly evaluate the impacts of “factory ships” on the ecosystem, Section 7 of the EA evaluates the impacts of fishery operations of all sizes of vessels that fish within Federal waters on all aspects of the marine environment, including target and non-target species, endangered species, marine mammals, and habitat.

*Comment 8:* One individual suggested that all fisheries management decisions must be guided by peer reviewed scientific analysis to drive rational decisions.

*Response:* Fishery management decisions must be based upon the best scientific information available, as required by National Standard 2 of the Magnuson-Stevens Act. The best available scientific information can take many forms and does not always take the form of peer reviewed analysis. All fishery measures are developed, analyzed, and reviewed by Council and NMFS staff, external scientists, academic researchers, industry representatives, and others with scientific expertise.

*Comment 9:* Seafreeze Ltd. expressed concern that measures were not based on a scientific threshold for determining whether a species is a forage species in this amendment. It noted that the Council did not use the SSC’s dietary threshold in its definition of forage species (forage species represent greater than five percent of an animal’s diet for more than five years), suggesting that a lack of a threshold or consistent diet data calls into question the purpose of this action.

*Response:* As noted above, the Council did not rely exclusively upon the SSC's forage species criteria to inform its decision to include forage species for this action, although the SSC's criteria did serve as the starting point for Council consideration. Section 4.2 of the EA prepared for this action notes that there were "no uniform quantitative metrics available to compare the trophic level of a number of forage species, or to assess the number of trophic linkages for each species." Instead, the Council determined how to best evaluate the SSC's and other criteria used to define forage species. The Council used alternative dietary criteria due to the diversity of diet for many species. Specifically, the SSC's dietary criteria would have reduced the list of forage species to only a few species, many of which are not found in Federal waters. As a result, any proposed measures to protect such a limited list of forage species would not likely have been effective or offer much benefit to managed species important to commercial and recreational fisheries managed by the Council. Accordingly, the Council used a lower threshold to be more inclusive of forage species in this action, while still prioritizing protection for species that had the greatest potential to support future large-scale commercial fisheries.

*Comment 10:* The Garden State Seafood Association (GSSA) was critical of the amendment's purpose and goals, indicating that there is no biological benefit from the proposed measures. This group suggested that NMFS should delay the implementation of this final rule until measurable goals can be identified.

*Response:* We disagree that there is no biological benefit from this action. Although this action maintains existing catch levels for forage species, in the long-term, this action will help maintain sustainable populations of several forage species for various

predators, including Council-managed predators, protected species predators, and seabirds. The purposes of this action are to prevent the expansion of existing and the development of future commercial fisheries for certain forage species while the Council collects the information it needs to assess the impacts to existing fisheries, fishing communities, and the marine ecosystem. The measures implemented by this action do exactly that. Because data have not been collected on the catch of these species, it is difficult to quantitatively assess the impacts of forage species on predators, the marine ecosystem, and communities at this time. Therefore, implementation of reporting requirements through this final rule will provide the information the Council and NMFS need to assess catch of these species and develop more effective measures in the future, as necessary.

*Comment 11:* Seafreeze Ltd. and Lund's Fisheries Incorporated are concerned that state permitted vessels do not have similar restrictions on the catch of forage species, with Lund's Fisheries suggesting that this creates two classes of fishermen and penalizes those with a Federal permit from selling forage species. Lund's Fisheries suggested that NMFS and the Council should encourage the Atlantic States Marine Fisheries Commission to take similar action to protect forage species in state waters.

*Response:* Neither the Council, nor NMFS has the authority to require states to implement similar measures to protect forage species. Because each state has a seat on the Council, and the Council has already expressed its interest in protecting forage species, it is incumbent upon each state to decide whether it should implement similar forage species measures within waters under their jurisdiction. We disagree that this penalizes Federal permit holders from selling catch of these species, as it implements possession limits that

reflect 99 percent of trip-level commercial landings of forage species over the past 20 years. Therefore, based on recent fishing operations, vessels issued a Federal permit should not be negatively affected by these possession limits.

*Comment 12:* One individual suggested that this action violates NOAA Administrative Order (NAO) 216-6A because the Council did not examine whether this action would set a precedent for future action with significant effects or represent a decision in principle about future consideration. He also stated that the use of discretionary authority under section 303(b)(12) of the Magnuson-Stevens Act to manage chub mackerel sets a precedent regarding the regulation of commercially targeted species outside of a FMP and without adequate oversight. In contrast, Pew supports the use of such discretionary authority until the species can be formally integrated as a species within the Atlantic Mackerel, Squid, and Butterfish FMP.

*Response:* The commenter cites text related to the determination of significance of NOAA's actions as required by the NEPA from an outdated version of NAO 216-6A dated May 20, 1999. The new version of NAO 216-6A became effective April 22, 2016, and contains no such language. In fact, the new version authorizes the development of a companion manual to set policy and procedures for complying with NEPA. That companion manual became effective January 13, 2017, and contains the text referenced by the commenter, but in the context of evaluating the use of a categorical exclusion under extraordinary circumstances. Since the Council developed an EA in support of this action, this policy guidance is not relevant to this action. The Council will evaluate the significance of any future action it may develop for chub mackerel as it develops measures for that particular action.

We disagree that the use of section 303(b)(12) of the Magnuson-Stevens Act to develop chub mackerel measures under this action sets a precedent that would allow commercial fishing to occur outside of a FMP and without oversight. Section 303(b) specifically authorizes the development of such discretionary measures as part of a FMP. Therefore, this section allows for increased management and oversight of commercial fisheries by the Council, not the opposite. We agree with Pew in that it represents a viable mechanism to proactively implement interim measures to manage this species while the Council develops the required provisions to formally manage chub mackerel as a stock in an FMP.

*Comment 13:* Two individuals recommended that this action should include river herring, with one citing the millions of taxpayer dollars spent to restore habitat and breeding streams that would be wasted if these species are not protected. He indicated that NMFS needs to collect more data and protect river herring in the ocean. Three individuals suggested that this action should also include Atlantic menhaden as a forage species.

*Response:* Because the Council did not consider managing river herring or Atlantic menhaden as forage species under this action, NMFS does not have the authority to add these species through this final rule. The Council has already considered ways to manage river herring as part of Amendment 14 to the Atlantic Mackerel, Squid, and Butterfish FMP and associated specifications since 2014. Specifically, the Council established a river herring and shad catch cap in the mackerel fishery and established reporting requirements to monitor such catch in the mackerel fishery. The Atlantic States Marine Fisheries Commission (ASMFC) already manages Atlantic menhaden because this

species is predominantly found in nearshore waters and is prosecuted by state fisheries. The Council could consider management measures for these species and other species through a future action, as appropriate.

### **Ecosystem Component Species**

*Comment 14:* One individual indicated that, until there is sufficient science on the population dynamics and trophic significance of all forage species originally listed (presumably by the SSC or Fishery Management Action Team), none of the species should be omitted from this action. Another individual indicated that the Council should be precautionary and implement catch limits for all forage species.

*Response:* Section 4.2 of the EA describes the background for how the Council determined which forage species to include in this action. The Council did not intend to prohibit the harvest of all unmanaged forage species. Instead, the Council identified a list of prioritized forage species to minimize the burden of the proposed new regulations on existing managed fisheries. In selecting the taxa to include in this amendment, the Council prioritized some species due to their importance as prey for “socially and economically important species” and their perceived potential to become the target of large-scale commercial fisheries. The Council could add forage species through a future action as more information becomes available, or as needed to achieve conservation and management objectives.

*Comment 15:* Seafreeze Ltd. and the GSSA oppose the approval of halfbeaks, scaled sardine, Atlantic thread herring, and Spanish sardine as EC species in this action, because there is no link as forage or bycatch between these species and fisheries managed by the Council. They contend that none of these species have been found in NMFS

observer data for trawls, gillnets, or hook gear resulting in landings of Council managed species; that they have not been found in the stomachs of Council managed species in NMFS surveys; and that they fail to meet all the criteria for listing as an EC species and the forage species criteria developed by the SSC.

*Response:* We disagree that these species fail to meet the criteria for listing as an EC species, as the amendment provides information that supports the determination that these species are eligible to be listed as EC species based on the criteria outlined in the National Standard Guidelines at § 600.305. The Council relied in part on the SSC's definition of forage species as well as other criteria in its proposed list of forage species to manage as EC species in this action. Section 6.1 of the EA identifies the rationale for the inclusion of each species in this action. While halfbeaks have not been found in the stomach contents of managed species in NMFS surveys, they were documented as forage for bluefish, a Council-managed species, in another source. Further, the Council notes that halfbeaks are often caught in Florida and are commonly used as bait in Mid-Atlantic recreational fisheries, making them vulnerable to potential future commercial exploitation. There is sufficient evidence that other unmanaged herrings and sardines are consumed as forage for many Council-managed species, are often documented as bycatch in managed fisheries, and are potentially vulnerable to commercial exploitation due to market demand.

*Comment 16:* The GSSA, Seafreeze Ltd., and Lund's Fisheries Incorporated opposed the inclusion of bullet and frigate mackerel as EC species for the same reasons we highlighted in the proposed rule. However, Pew and Wild Oceans, along with 11,496 Pew form letters, supported the inclusion of these species, highlighting their importance to ecosystems and coastal communities who directly or indirectly depend upon the catch or

use of these species. One individual disagreed with our assertion that the trophic level of these species is too high, suggesting that trophic linkages are truncated in pelagic ecosystems. Pew noted that bullet and frigate mackerel are vulnerable to commercial exploitation because they school in predictable areas, while Wild Oceans contended that protecting bullet and frigate could reduce predation on managed species by providing more prey for common predators. Supporters also noted that many significant keystone predators such as large pelagic species (tuna, billfish, swordfish, dolphinfish (dorado) and sharks) feed on these mackerel, and a failure to protect them could cause trophic cascading (*e.g.*, effects on species higher or lower in the food chain as a result of changes in prey or predator abundance) and indirect and unpredictable effects (presumably reduced abundance) on large pelagic species.

*Response:* As noted above, we maintain our original contention that the best available information does not support the classification of bullet and frigate mackerel as forage species in this action and that they are not related to species managed by the Council. Public comments did not provide additional information that would change this determination. The SSC did not differentiate trophic structure criteria based on where organisms were found, and the commenter did not provide sufficient evidence to warrant such a differentiation. Although Wild Oceans asserts that these species are vulnerable to commercial exploitation because they school in predictable areas, Pew notes that these species are less vulnerable to commercial fishing, particularly trawl gear, because of their fast swimming speed. This, in conjunction with minimal commercial landings of these species over the past 20 years, suggests that these species are not vulnerable to commercial exploitation at this time. While we acknowledge that bullet and frigate are



prey for large pelagic species, available information does not confirm that bullet and frigate mackerel constitute a substantial component of the diet of large pelagic species, or that they are forage for managed species. Therefore, there is insufficient information in the amendment to conclude that failure to protect these species through this action would cause trophic cascading or negative impacts on managed species or large pelagic predators.

*Comment 17:* Pew asserts that a nexus between forage species and regulated species is not required by the Magnuson-Stevens Act, noting that the discretionary authority provided in section 303 can be used to conserve target and non-target species considering ecological factors that may affect fish populations. They also cite the National Standard 1 guidelines in highlighting that maintaining adequate forage may prevent overfishing and achieve optimum yield. Wild Oceans indicates that these Guidelines allow flexibility to achieve ecosystem goals, including those in the Council's ecosystem approach to fisheries management (EAFM) guidance document, and that failure to include these species is contrary to NMFS' ecosystem based fishery management (EBFM) policy.

*Response:* We agree that section 303 of the Magnuson-Stevens Act provides the Council with the discretion to implement measures for target and non-target species for ecosystem considerations. As noted in the scoping document for this action and Council meetings during the development of this action, the intent of this action was to maintain an adequate biomass of forage species to allow for abundant populations of Council-managed predators, as well as to integrate ecosystem considerations into the FMP. NMFS determined that forage species considered in this action must have an ecological or

operational (bycatch) linkage with Council-managed species in order to maintain consistency with the Council's intent to maintain an adequate biomass of forage species to allow for abundant populations of Council-managed predators of the forage species. Although the description of the purpose and need for this action, as included in the EA, indicated that the Council was also integrating an ecosystem approach to management into this action, the Council did so by protecting forage species; this action was not intended to be a comprehensive ecosystem management action. NMFS must evaluate this action within the context in which it was developed, and using the best available information, which, as noted above, is not sufficient to justify inclusion of bullet and frigate mackerel as EC species under this action.

We also agree that the National Standard 1 Guidelines allow the Council to consider forage and EC species when determining optimum yield and the greatest benefit to the nation. However, it is important to note that the National Standard 1 Guidelines apply to stocks in the fishery that the Council determines require conservation and management. By proposing to manage bullet and frigate mackerel as EC species, the Council has implicitly determined that such species do not require conservation and management measures at this time pursuant to the National Standard Guidelines at § 600.305(c)(5) and are, therefore, not stocks in the fishery. Accordingly, the National Standard 1 Guidelines do not apply to these species. That notwithstanding, if the Council believes that these species require conservation and management in the future, a small tuna FMP or a broader ecosystem based management action may be a more effective vehicle to manage these species than an amendment predicated on protecting forage for managed species. Finally, despite the disapproval of bullet and frigate mackerel as EC

species in this action, we contend that the Council's use of discretionary authority to designate certain other previously unmanaged forage species as EC species and to implement measures to protect against the further exploitation of these species is consistent with both the Council's EAFM guidance document and the NMFS EBFM policy.

### **Permitting and Reporting Requirements**

*Comment 18:* Pew, Lund's Fisheries Incorporated, and the GSSA support the use of existing permitting requirements for this action. They, along with one individual and the 11,484 respondents to the Pew form letter, also support the use of existing reporting requirements to collect additional data on these species. Another individual indicated that the proposed reporting requirements would not collect acceptable data, but did not suggest why. The Office of Management and Budget indicated that this action would have no effect on any current information collections.

*Response:* The existing permitting and reporting requirements are necessary to collect information to effectively monitor and manage the catch of forage species. The permitting and reporting requirements allow us to identify which vessels are catching chub mackerel and Mid-Atlantic forage species, how much they are catching of each species or species group, where and when the catch occurs, and what gear is used to catch these species. This information could then be used to monitor catch against the chub mackerel annual landing limits, enforce possession limits, and provide information necessary to assess the status of the stock and develop potential future management measures, as necessary. Thus, this final rule implements the permitting and reporting requirements for Mid-Atlantic forage species.

## **Annual Landing and Possession Limits**

*Comment 19:* One individual suggested that NMFS should stop all fishing for forage species, stating that, without limits, commercial vessels will harvest them until endangered and overfished. Respondents to the Pew form letter and another individual suggested that forage fish quotas should be set to prevent overfishing.

*Response:* We do not agree that it is necessary to stop all fishing for forage species or impose quotas for all species to prevent overfishing or prevent such species from becoming endangered. We do not know much about the status of these species. As noted in the response to the previous comment, the information collected through measures implemented by this final rule will: provide the information the Council needs to effectively monitor the catch of these species; allow the Council and NMFS to evaluate the potential impacts of existing catch levels on existing fisheries, fishing communities, and the marine ecosystem; and allow the Council and NMFS to set appropriate future landing limits to prevent overfishing, as necessary.

*Comment 20:* One individual recommended that NMFS implement a 5.25 million-lb (2,381-mt) annual landing limit for chub mackerel because it reflects the historical fluctuation of the chub mackerel market, is more consistent with the market's overall direction, avoids implementing artificial constraints, allows equal access to the market, and facilitates competition in the market rather than consolidating control by a select group of large vessels. He notes that implementing the proposed 2.86 million lb (1,297 mt) limit artificially caps the market and could increase landing price to the disproportionate benefit of large vessels. Lund's Incorporated and the GSSA support the higher limit, stating there is no evidence that the higher limit would harm the stock and

that it would reduce discards until the SSC can set a reasonable biologically-based limit in a future action. They also suggest the ecosystem management approach should consider changing species distribution, including the increasing availability of a species like chub mackerel in setting landing limits. In contrast, Pew and another individual felt that the proposed limit is too high and that the limit should be set lower as a precaution because NMFS does not have adequate data about biological and ecological status of stock, what fishing level is sustainable, and the impacts of recent increased fishing.

*Response:* Although chub mackerel landings have fluctuated greatly since 1996, landings since 2013 are substantially higher than previous years. The Council considered several alternative annual landing limits for chub mackerel, including the average landing amount from 1996-2015 (900,127 lb (408 mt)), average landings from 2011-2015 (1.75 million lb (794 mt), and the highest landings recorded in 2013 (5.25 million lb (2,381 mt)). Instead, the Council adopted a 2.86 million-lb (1,297-mt) annual landing limit to reflect more recent average landings between 2013-2015. This limit accounts for variations in resource availability and catch, and is higher than the five-year average landings, but lower than the highest landings recorded in 2013. This compromise is not only consistent with the purpose of this action to maintain existing catch levels, but also with the principles advocated by several commenters to mirror recent landings trends, reduce discards, and set a precautionary catch limit while the Council develops long-term measures in a subsequent action.

We disagree that the chub mackerel annual landing limit implemented by this final rule implements artificial constraints, prevents equal access to the resource or markets, or disproportionately benefits large vessels. Even without constraints, the landing price for

chub mackerel has been highly variable and not necessarily correlated with landing amounts since 1996. The EA suggests that landings amounts and associated price is affected by several variables, including availability of chub mackerel and other species. Therefore, the Council and NMFS cannot determine how any one particular measure affects market prices at this time. All vessels of all sizes have equal access to available chub mackerel under this action. Section 8.11.4.3 of the EA describes the economic impact analysis required under the Regulatory Flexibility Act (RFA). That analysis indicates that between 2006 and 2015, 63 small businesses and affiliated entities reported fishing revenues from forage species affected by this action. All of these entities had average annual sales during 2013-2015 that were less than \$11 million, which is the level of annual fishery revenue used to determine small entities under the RFA. Thus, all entities affected by this action are classified as small businesses. Further, this analysis concluded that all proposed measures, including the chub mackerel annual landing limit, would not place a substantial number of small entities at a significant competitive disadvantage to large entities.

*Comment 21:* Seafreeze Ltd., Lund's Fisheries Incorporated, and the GSSA support the 40,000-lb (18-mt) chub mackerel possession limit once the annual landing limit is reached. Pew indicated that the limit is not supported by the best available science or a methodology similar to the limit used to derive the possession limit for other EC species, suggesting that it should be lower to prevent a directed fishery. Another individual stated the possession limit is higher than annual chub mackerel landings before 2003, and suggested that it disproportionately benefits larger vessels. He recommended that if NMFS implements the 2.86 million-lb (1,297-mt) chub mackerel annual landing

limit, NMFS should also implement the 10,000-lb (4.5-mt) possession limit because the annual limit and possession limit must be similarly restrictive to equitably restrict all fisheries regardless of size and better align with the amendment's purpose of preventing fishery expansion. He also noted that the lower possession limit reduces discards, but does not provide enough incentive to target the species.

*Response:* To be consistent with the methodology used by the Council to determine the possession limit for EC species, the Council would have had to adopt a much higher chub mackerel possession limit than the proposed 40,000-lb (18-mt) limit. The limit for EC species was based on the 99<sup>th</sup> percentile of dealer-reported landings of these species from 1997-2015. That limit was meant to maintain existing catch levels for those species. In contrast, as noted by Pew, the chub mackerel limit was intended to prevent directed fishing. Accordingly, using a similar methodology is not appropriate, as the trip limit should reduce incentives to target chub mackerel.

The Council chose a 40,000-lb (18-mt) limit because that is the capacity of a bait truck, and limiting landings to that amount reduces economic incentives to target chub mackerel, while allowing vessels to land smaller, incidental amounts of chub mackerel to minimize discards. The Council considered a 10,000-lb (4.5-mt) possession limit based on average trip-level landings from 1996-2015, but that would likely result in higher discards due to larger volumes of chub mackerel caught by larger vessels in recent years. The possession limit selected is separate and distinct from the annual landings limit, and does not need to be proportional to have the desired effect of reducing incentives to target this species once the annual landing limit is caught. We recognize that the possession limit is higher than annual landings before 2003, but note that landings since 1996 have

been highly variable, ranging from 479 lb (217 kg) to 5.25 million lb (2,381 mt). Contrary to what one commenter indicated, this possession limit would actually benefit smaller capacity vessels more than larger capacity vessels because it is less likely to constrain landings once the annual landing limit is reached. Section 5.2.3 of the EA states that there is a substantial range in landing amounts within the fishery, concluding that the amount of chub mackerel catch which is truly incidental is not well understood and is likely different for larger, faster vessels than for smaller, slower vessels.

*Comment 22:* Pew, Lund's Fisheries Incorporated, and the GSSA support the proposed 1,700-lb (771-kg) limit for EC species.

*Response:* This final rule implements this trip limit for approved EC species.

*Comment 23:* The Executive Director of the New England Fishery Management Council highlighted that existing regulations for the Northeast Multispecies FMP only allow the retention of certain species in exempted fisheries within the Southern New England Regulated Mesh Area, an area that overlaps with the proposed Mid-Atlantic Forage Species Management Unit. He suggested that the final rule clarify that the most restrictive possession limit would apply to vessels subject to the Northeast Multispecies FMP that are fishing within the Mid-Atlantic Forage Species Management Unit.

*Response:* We agree. This was an oversight, and we made the appropriate changes to the regulatory text at § 648.351(a) in this final rule.

### **Transit Measure**

*Comment 24:* Seafreeze Ltd. supported the transit measure, but both Lund's Fisheries Incorporated and the GSSA opposed the measure, stating that it creates an unfair



competitive situation by allowing harvesters from other jurisdictions to be exempted from possession limits imposed on Mid-Atlantic harvesters.

*Response:* The transit measure would only apply to catch of Mid-Atlantic forage species outside of the Mid-Atlantic Forage Species Management Unit (Mid-Atlantic Federal waters), which is outside of the jurisdiction of the Mid-Atlantic Fishery Management Council. In addition, because transiting vessels must have their gear stowed when transiting the Management Unit, this measure is unlikely to negatively impact Mid-Atlantic forage species, managed species, or other predators. Further, this measure was developed mostly to address the targeting of chub mackerel within the Gulf of Mexico that are landed in Rhode Island. Since this action counts all chub mackerel landed in New England ports against the chub mackerel annual landing limit, impacts to chub mackerel are minimized. The Magnuson-Stevens Act requires the Council to manage a stock throughout its range. Therefore, when considering integrating chub mackerel into the Atlantic Mackerel, Squid, and Butterfish FMP in a future action under development, the Council will need to consider the species range as it develops measures for that action, including potentially reconsidering the need for this transiting provision.

#### **Other Administrative Measures**

*Comment 25:* Pew Charitable Trusts noted that the Mid-Atlantic Fishery Management Council manages some species to the Virginia/North Carolina border and others to the latitude of Cape Hatteras. Pew supported extending the Mid-Atlantic Forage Species Management Unit to Cape Hatteras to ensure there is no gap in the management of these species within the jurisdiction of the Mid-Atlantic Fishery Management Council.

*Response:* We agree and have implemented the Management Unit as proposed.

*Comment 26:* The GSSA and Lund's Fisheries Incorporated supported the ability to revise landing and possession limits through a future framework adjustment action.

*Response:* The framework measures have been implemented through this action.

*Comment 27:* The GSSA, Lund's Fisheries Incorporated, and the Pew Charitable Trusts support the use of an EFP to support the development of any new or expanded fishery for forage species. Pew indicated that the Council should emulate the more formal EFP review process adopted by the Pacific Fisheries Management Council as part of its Comprehensive Ecosystem Based Amendment 1 and documented in its Council Operating Procedure 24 before opening or expanding any fishery. Pew also recommended that NMFS should prohibit new or expanded fishing on EC species until full Federal management is in place that protects their role as prey in the ecosystem, and that the Council should evaluate whether a species is in need of conservation and management before allowing new or expanded fisheries for these species.

*Response:* The Council documented its intent to require an EFP and subsequent review through the adoption of this action. Existing regulations at § 648.12 require the Regional Administrator to consult with the Council's Executive Director before approving any exemptions to the Council's FMPs. The regulations revised by this action have already expanded that consultation requirement to specifically include exemptions that would contribute to the development of a new fishery or the expansion of existing fisheries for Mid-Atlantic forage species and chub mackerel. Therefore, the Council has already developed a protocol similar to the Pacific Council's Operating Procedure 24.

At § 648.14(w), this action implements a prohibition against vessels possessing more Mid-Atlantic Forage Species and chub mackerel than authorized in § 648.351. As a

result, no additional prohibition is needed to prevent the expansion of existing fisheries or the development of new fisheries for these species. In addition, fisheries for Mid-Atlantic Forage Species cannot develop or expand without a future Council or NMFS action, which must be consistent with the Magnuson-Stevens Act and other applicable law. Thus, both the Council and NMFS will evaluate whether a stock requires conservation and management, and NMFS will ensure that all measures developed for those stocks in the future, including measures to achieve optimum yield, are consistent with applicable law, before approving any new or expanded fisheries for EC species.

*Comment 28:* Pew Charitable Trusts recommended that NMFS update the list of authorized fisheries and gear in § 600.725(v) to ensure that no fishery on unmanaged forage species emerges without the knowledge of NMFS and the Council.

*Response:* As noted in Section 5.3.2.2 of the EA for this action, the list of authorized fisheries and gear at § 600.725(v) already includes two general categories of commercial fisheries for which the legal harvest of unmanaged forage species would be allowed without advanced notification to the Council. The Council considered modifying this list as part of this action, but instead implemented more discrete possession limits for forage species. As a result, NMFS cannot unilaterally implement such changes through this final rule. It is likely that any fishery for other unmanaged forage species would be detected through existing data collections such as the vessel logbook or dealer reports. For example, landings of several species of previously unmanaged forage species included in this action (anchovies, argentines, sand lances, silversides, chub mackerel, and frigate mackerel) were recorded in Federal dealer reports. This prompted the Council to develop

appropriate management measures through this and the follow-on chub mackerel amendment. Similar action can be taken in the future for other species, as appropriate.

### **Impact Analysis**

*Comment 29:* One individual indicated that the negative socioeconomic impacts of this action will be offset by the positive socioeconomic impacts of maintaining healthy populations of forage species. He also noted that the amendment should consider the recreational and professional diving communities in the socioeconomic impact analysis, as a lack of forage species could negatively affect seal and predator populations, which are important drivers of demand for diving and spearfishing trips. The comment included a statement from another individual who estimated that dive shops in the Greater Boston Area cater to up to 1,500 divers each year and have yearly revenues of \$3-4 million.

*Response:* We agree that the benefits of maintaining recent catch levels of certain forage species through measures implemented by this action outweigh the potential costs associated with annual landing limits and possession limits. The EA prepared for this action included a description of the affected environment in Section 6, and an evaluation of the impacts of the proposed measures on components of the affected environment, including marine predators such as fish species, marine mammals, and fishing communities, in Section 7. The socioeconomic impact analysis focused on commercial and recreational fishery participants because they are the entities most likely to be affected by this action. That analysis did not evaluate impacts to diving operations because diving operations are only indirectly affected by this action and are not subject to these measures. As a result, the Regulatory Flexibility Act does not require consideration of the impacts to non-regulated entities such as the diving industry. However, this action should provide

benefits to the diving community similar to the benefits that would accrue to the recreational fishery in that it will protect forage species from further commercial exploitation, which will help maintain predator and seal populations important to the spearfishing and diving communities.

### **Changes From the Proposed Rule**

We have made several changes to the proposed regulations, including changes as a result of public comment and our decision to disapprove the inclusion of bullet and frigate mackerel as EC species. Some of these changes are administrative in nature, clarify the new or existing management measures, or correct inadvertent omissions in the proposed rule. All of these changes are consistent with section 305(d) of the Magnuson-Stevens Act (16 U.S.C. 1855(d)), which provides that the Secretary of Commerce may promulgate regulations necessary to ensure that amendments to an FMP are carried out in accordance with the FMP and the Magnuson-Stevens Act. These changes are listed below in the order that they appear in the regulations.

In this final rule's amendments to § 648.2, paragraph (a)(14) is renumbered as (a)(12), and paragraph (a)(15) is renumbered as (a)(13), to reflect the disapproval of the inclusion of bullet and frigate mackerel as Mid-Atlantic forage species in this final rule.

The regulations at §§ 648.4(a)(15), 648.5(a)(2), 648.6(a)(1), 648.7(a)(1) and (b)(1)(i), and 648.351(d) were revised by adding language specifying that the vessel permit, operator permit, dealer permit, reporting requirements, and transiting provision for vessels fishing for and possessing Atlantic chub mackerel and dealers purchasing chub mackerel are effective through December 31, 2020, as intended.

In § 648.351(a), the phrase “Unless otherwise prohibited under § 648.80,” was added to the beginning of this paragraph to reference the possession restrictions of Northeast multispecies exempted fisheries. As noted above in Comment 23, the Executive Director of the New England Fishery Management Council indicated that the proposed possession limits for Mid-Atlantic forage species would inadvertently allow a vessel to possess species that are not explicitly authorized for exempted fisheries implemented under the Northeast Multispecies FMP.

### **Classification**

The Administrator, Greater Atlantic Region, NMFS, determined that the Mid-Atlantic Unmanaged Forage Omnibus Amendment is necessary for the conservation and management of the fisheries managed by the Mid-Atlantic Fishery Management Council and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866. This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. NMFS received two comments regarding the socioeconomic impacts of this action (see Comments 20 and 29 above). In Comment 20, the commenter suggested that this action would artificially cap the market that could

disproportionately benefit large vessels. However, as noted above, because all entities affected by this action are small businesses, this action could not place a substantial number of small entities at a significant competitive disadvantage to large entities. Comment 20 pertained to the diving community, a group that is not subject to the regulations under this action. Accordingly, no comments were received that would change the certification that this action will not have a significant economic impact on a substantial number of small entities regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by the Office of Management and Budget (OMB) under the OMB control numbers listed below. Public reporting burden for these collections of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information, are estimated to average, as follows:

1. Initial Federal vessel permit application, OMB# 0648-0202, (45 minutes/response);
2. Initial Federal dealer permit application, OMB# 0648-0202, (15 minutes/response);
3. Initial Federal operator permit application, OMB# 0648-0202, (60 minutes/response);
4. Vessel logbook report of catch by species, OMB# 0648-0212, (5 minutes/response); and

5. Dealer report of landings by species, OMB# 0648-0229, (4 minutes/response).

Send comments on these or any other aspects of the collection of information to the Greater Atlantic Regional Fisheries Office at the **ADDRESSES** above, and e-mail to *OIRA\_Submission@omb.eop.gov*, or fax to (202) 395-5806. Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

#### **List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: August 21, 2017

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Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,  
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

#### **PART 648--FISHERIES OF THE NORTHEASTERN UNITED STATES**

1. The authority citation for part 648 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*

2. In § 648.2, add definitions for “Atlantic chub mackerel” and “Mid-Atlantic forage species” in alphabetical order to read as follows:



**§ 648.2 Definitions.**

\* \* \* \* \*

*Atlantic chub mackerel* means *Scomber colias*.

\* \* \* \* \*

*Mid-Atlantic forage species* means the following species and species groups:

(1) Anchovies (family Engraulidae), including but not limited to the following species:

- (i) Striped anchovy-*Anchoa hepsetus*.
- (ii) Dusky anchovy-*Anchoa lyolepis*.
- (iii) Bay anchovy-*Anchoa mitchilli*.
- (iv) Silver anchovy-*Engraulis eurystole*.

(2) Argentines (family Argentinidae), including but not limited to the following species:

- (i) Striated argentine-*Argentina striata*.
- (ii) Pygmy argentine-*Glossanodon pygmaeus*.

(3) Greeneyes (family Chlorophthalmidae), including but not limited to the following species:

- (i) Shortnose greeneye-*Chlorophthalmus agassizi*.
- (ii) Longnose greeneye-*Parasudis truculenta*.

(4) Halfbeaks (family Hemiramphidae), including but not limited to the following species:

- (i) Flying halfbeak-*Euleptorhamphus velox*.
- (ii) Balao-*Hemiramphus balao*.

(iii) Ballyhoo-*Hemiramphus brasiliensis*.

(iv) False silverstripe halfbeak/American halfbeak/Meek's halfbeak-

*Hyporhamphus meeki*.

(5) Herrings and Sardines (family Clupeidae). With the exception of other herring and sardine species managed under this part, including American shad, Atlantic herring, blueback herring, hickory shad, and river herring/alewife, as defined in this section, the following herring and sardine species are Mid-Atlantic forage species:

(i) Round herring-*Etrumeus teres*.

(ii) Scaled sardine-*Harengula jaguana*.

(iii) Atlantic thread herring-*Opisthonema oglinum*.

(iv) Spanish sardine-*Sardinella aurita*.

(6) Lanternfishes (family Myctophidae), including but not limited to the following species:

(i) Horned lanternfish-*Ceratoscopelus maderensis*.

(ii) Dumril's headlightfish-*Diaphus dumerilii*.

(iii) Crocodile lanternfish-*Lampanyctus crocodilus*.

(iv) Doflein's false headlightfish-*Lobianchia dofleini*.

(v) Spotted lanternfish-*Myctophum punctatum*.

(7) Pearlsides (family Sternoptychidae), including but not limited to the following species:

(i) Atlantic silver hatchetfish-*Argyropelecus aculeatus*.

(ii) Muller's pearlside-*Maurolicus muelleri*.

(iii) Weizman's pearlside-*Maurolicus weitzmani*.

(iv) Slope hatchetfish-*Polyipnus clarus*.

(8) Sand lances (family Ammodytidae), including but not limited to the following species:

(i) American/inshore sand lance-*Ammodytes americanus*.

(ii) Northern/offshore sand lance-*Ammodytes dubius*.

(9) Silversides (family Atherinopsidae), including but not limited to the following species:

(i) Rough silverside-*Membras martinica*.

(ii) Inland silverside-*Menidia beryllina*.

(iii) Atlantic silverside-*Menidia menidia*.

(10) Cusk-eels (order Ophidiiformes), including but not limited to the following species:

(i) Chain pearlfish-*Echiodon dawsoni*.

(ii) Fawn cusk-eel-*Lepophidium profundorum*.

(iii) Striped cusk-eel-*Ophidion marginatum*.

(11) Atlantic saury-*Scomberesox saurus*.

(12) Pelagic mollusks and cephalopods, excluding sharptail shortfin squid (*Illex oxygonius*), but including the following pelagic mollusc species:

(i) Neon flying squid-*Ommastrephes bartramii*.

(ii) European flying squid-*Todarodes sagittatus*.

(iii) Atlantic brief squid-*Lolliguncula brevis*.

(iv) Bobtail squids (family Sepiolidae), including but not limited to the following species:

- (A) Odd bobtail squid-*Heteroteuthis dispar*.
- (B) Big fin bobtail squid-*Rossia megaptera*.
- (C) Warty bobtail squid-*Rossia palpebrosa*.
- (D) Lesser bobtail squid-*Semirossia tenera*.
- (E) Butterfly bobtail squid-*Stoloteuthis leucoptera*.
- (v) Sea angels and sea butterflies (orders Gymnosomata and Thecosomata).
- (vi) Tuberculate pelagic octopus-*Ocythoe tuberculata*.
- (13) Species under one inch as adults, including but not limited to the following

species groups:

- (i) Copepods (subclass Copepoda).
- (ii) Krill (order Euphausiacea).
- (iii) Amphipods (order Amphipoda).
- (iv) Ostracods (class Ostracoda).
- (v) Isopods (order Isopoda).
- (vi) Mysid shrimp (order Mysidacea).

\* \* \* \* \*

3. In § 648.4, add paragraph (a)(15) to read as follows:

**§ 648.4 Vessel permits.**

(a) \* \* \*

(15) *Mid-Atlantic forage species and Atlantic chub mackerel*. Any commercial fishing vessel must have been issued and have on board a valid commercial vessel permit issued in accordance with this paragraph (a)(15) to fish for, possess, transport, sell, or land Mid-Atlantic forage species or Atlantic chub mackerel in or from the EEZ portion of the

Mid-Atlantic Forage Species Management Unit, as defined at § 648.351(c). The vessel permit requirements specified in this paragraph (a)(15) for a commercial fishing vessel fishing for, possessing, transporting, selling, or landing Atlantic chub mackerel are effective through December 31, 2020. A vessel that fishes for such species exclusively in state waters is not required to be issued a Federal permit.

\* \* \* \* \*

4. In § 648.5, revise paragraph (a) to read as follows:

**§ 648.5 Operator permits.**

(a) *General.* (1) Any operator of a vessel issued a permit, carrier permit, or processing permit for, and that fishes for or possesses, the species listed in paragraph (a)(2) of this section, must have been issued, and carry on board, a valid operator permit for these species. An operator's permit issued pursuant to part 622 or part 697 of this chapter, satisfies the permitting requirement of this section. This requirement does not apply to operators of recreational vessels.

(2) Following are the applicable species: Atlantic sea scallops, NE multispecies, spiny dogfish, monkfish, Atlantic herring, Atlantic surfclam, ocean quahog, Atlantic mackerel, squid, butterfly, scup, black sea bass, or Atlantic bluefish, harvested in or from the EEZ; tilefish harvested in or from the EEZ portion of the Tilefish Management Unit; skates harvested in or from the EEZ portion of the Skate Management Unit; Atlantic deep-sea red crab harvested in or from the EEZ portion of the Red Crab Management Unit; or Atlantic chub mackerel and Mid-Atlantic forage species, as defined at § 648.2, harvested in or from the EEZ portion of the Mid-Atlantic Forage Species Management Unit, as defined at § 648.351(c). The operator permit requirements specified in this paragraph

(a)(2) for an operator of a vessel fishing for and possessing Atlantic chub mackerel are effective through December 31, 2020.

\* \* \* \* \*

5. In § 648.6, revise paragraph (a)(1) to read as follows:

**§ 648.6 Dealer/processor permits.**

(a) \* \* \*

(1) All dealers of NE multispecies, monkfish, skates, Atlantic herring, Atlantic sea scallop, Atlantic deep-sea red crab, spiny dogfish, summer flounder, Atlantic surfclam, ocean quahog, Atlantic mackerel, squid, butterfish, scup, bluefish, tilefish, and black sea bass; Atlantic surfclam and ocean quahog processors; Atlantic hagfish dealers and/or processors, and Atlantic herring processors or dealers, as described in § 648.2; must have been issued under this section, and have in their possession, a valid permit or permits for these species. A dealer of Atlantic chub mackerel or Mid-Atlantic forage species, as defined in § 648.2, harvested in or from the EEZ portion of the Mid-Atlantic Forage Species Management Unit, as defined at § 648.351(c), must have been issued and have in their possession, a valid dealer permit for any species issued in accordance with this paragraph. The dealer permit requirements specified in this paragraph (a)(1) for dealers purchasing Atlantic chub mackerel are effective through December 31, 2020.

\* \* \* \* \*

6. In § 648.7, revise paragraphs (a)(1) and (b)(1)(i) to read as follows:

**§ 648.7 Recordkeeping and reporting requirements.**

(a) (1) *Detailed report.* Federally permitted dealers, and any individual acting in the capacity of a dealer, must submit to the Regional Administrator or to the official

designee a detailed report of all fish purchased or received for a commercial purpose, other than solely for transport on land, within the time period specified in paragraph (f) of this section, by one of the available electronic reporting mechanisms approved by NMFS, unless otherwise directed by the Regional Administrator. The dealer reporting requirements specified in this paragraph (a)(1) for dealers purchasing or receiving for a commercial purpose Atlantic chub mackerel are effective through December 31, 2020. The following information, and any other information required by the Regional Administrator, must be provided in each report:

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) The owner or operator of any vessel issued a valid permit or eligible to renew a limited access permit under this part must maintain on board the vessel, and submit, an accurate fishing log report for each fishing trip, regardless of species fished for or taken, on forms supplied by or approved by the Regional Administrator. The reporting requirements specified in this paragraph (b)(1)(i) for an owner or operator of a vessels fishing for, possessing, or landing Atlantic chub mackerel are effective through December 31, 2020. If authorized in writing by the Regional Administrator, a vessel owner or operator may submit reports electronically, for example by using a VMS or other media. With the exception of those vessel owners or operators fishing under a surfclam or ocean quahog permit, at least the following information and any other information required by the Regional Administrator must be provided: Vessel name; USCG documentation number (or state registration number, if undocumented); permit number; date/time sailed;

date/time landed; trip type; number of crew; number of anglers (if a charter or party boat); gear fished; quantity and size of gear; mesh/ring size; chart area fished; average depth; latitude/longitude (or loran station and bearings); total hauls per area fished; average tow time duration; hail weight, in pounds (or count of individual fish, if a party or charter vessel), by species, of all species, or parts of species, such as monkfish livers, landed or discarded; and, in the case of skate discards, “small” (*i.e.*, less than 23 inches (58.42 cm), total length) or “large” (*i.e.*, 23 inches (58.42 cm) or greater, total length) skates; dealer permit number; dealer name; date sold, port and state landed; and vessel operator's name, signature, and operator's permit number (if applicable).

\* \* \* \* \*

7. In § 648.12, revise the introductory text to read as follows:

**§ 648.12 Experimental fishing.**

The Regional Administrator may exempt any person or vessel from the requirements of subparts A (General provisions), B (Atlantic mackerel, squid, and butterfish), D (Atlantic sea scallop), E (Atlantic surfclam and ocean quahog), F (NE multispecies and monkfish), G (summer flounder), H (scup), I (black sea bass), J (Atlantic bluefish), K (Atlantic herring), L (spiny dogfish), M (Atlantic deep-sea red crab), N (tilefish), O (skates), and P (Mid-Atlantic forage species and Atlantic chub mackerel) of this part for the conduct of experimental fishing beneficial to the management of the resources or fishery managed under that subpart. The Regional Administrator shall consult with the Executive Director of the MAFMC before approving any exemptions for the Atlantic mackerel, squid, butterfish, summer flounder, scup, black sea bass, spiny dogfish, bluefish, and tilefish fisheries, including exemptions for experimental fishing contributing



to the development of new or expansion of existing fisheries for Mid-Atlantic forage species and Atlantic chub mackerel.

\* \* \* \* \*

8. In § 648.14, add paragraph (w) to read as follows:

**§ 648.14 Prohibitions.**

\* \* \* \* \*

(w) *Mid-Atlantic forage species and Atlantic chub mackerel.* It is unlawful for any person owning or operating a vessel issued a valid commercial permit under this part to do any of the following:

(1) Fish for, possess, transfer, receive, or land; or attempt to fish for, possess, transfer, receive, or land; more than 1,700 lb (771.11 kg) of all Mid-Atlantic forage species combined per trip in or from the Mid-Atlantic Forage Species Management Unit, as defined at § 648.351(c). A vessel not issued a commercial permit in accordance with § 648.4 that fished exclusively in state waters or a vessel that fished Federal waters outside of the Mid-Atlantic Forage Species Management Unit that is transiting the area with gear that is stowed and not available for immediate use is exempt from this prohibition.

(2) Fish for, possess, transfer, receive, or land; or attempt to fish for, possess, transfer, receive, or land; more than 40,000 lb (18.14 mt) of Atlantic chub mackerel per trip in or from the Mid-Atlantic Forage Species Management Unit, as defined at § 648.351(c), after the annual Atlantic chub mackerel landing limit has been harvested and notice has been provided to the public consistent with the Administrative Procedure Act. A vessel not issued a commercial permit in accordance with § 648.4 that fished exclusively in state waters or a vessel that fished in Federal waters outside of the Mid-

Atlantic Forage Species Management Unit that is transiting the area with gear that is stowed and not available for immediate use is exempt from this prohibition.

9. Add subpart P to read as follows:

**Subpart P-Mid-Atlantic Forage Species and Atlantic Chub Mackerel**

Sec.

648.350 Mid-Atlantic forage species and Atlantic chub mackerel annual landing limits.

648.351 Mid-Atlantic forage species and Atlantic chub mackerel possession limits.

648.352 Mid-Atlantic forage species and Atlantic chub mackerel framework measures.

**§ 648.350 Mid-Atlantic forage species and Atlantic chub mackerel annual landing limits.**

(a) *Mid-Atlantic forage species*. There is no annual landing limit for Mid-Atlantic forage species, as defined at § 648.2.

(b) *Atlantic chub mackerel*. Effective through December 31, 2020, the annual landings limit for Atlantic chub mackerel is set at 2.86 million lb (1,297 mt). All landings of Atlantic chub mackerel by vessels issued a Federal commercial permit in accordance with § 648.4 in ports from Maine through North Carolina shall count against the annual landings limit. NMFS shall close the directed fishery for Atlantic chub mackerel in the EEZ portion of the Mid-Atlantic Forage Species Management Unit in a manner consistent with the Administrative Procedure Act when the Regional Administrator determines that 100 percent of the Atlantic chub mackerel annual landings limit has been harvested. Following closure of the directed Atlantic chub mackerel fishery, a vessel must adhere to the possession limit specified in § 648.351(b).

**§ 648.351 Mid-Atlantic forage species and Atlantic chub mackerel possession limits.**

(a) *Mid-Atlantic forage species*. Unless otherwise prohibited in § 648.80, a vessel

issued a valid commercial permit in accordance with § 648.4 may fish for, possess, and land up to 1,700 lb (771.11 kg) of all Mid-Atlantic forage species combined per trip in or from the EEZ portion of the Mid-Atlantic Forage Species Management Unit, as defined in paragraph (c) of this section. A vessel not issued a permit in accordance with § 648.4 that is fishing exclusively in state waters is exempt from the possession limits specified in this section.

(b) *Atlantic chub mackerel*. Effective through December 31, 2020, a vessel issued a valid commercial permit in accordance with § 648.4 may fish for, possess, and land an unlimited amount of Atlantic chub mackerel from the Mid-Atlantic Forage Species Management Unit, as defined in paragraph (c) of this section, provided the Atlantic chub mackerel annual landing limit has not been harvested. Once the Atlantic chub mackerel annual landing limit has been harvested, as specified in § 648.350, a vessel may fish for, possess, and land up to 40,000 lb (18.14 mt) of Atlantic chub mackerel per trip in or from the Mid-Atlantic Forage Species Management Unit for the remainder of the fishing year (until December 31). A vessel not issued a permit in accordance with § 648.4 that is fishing exclusively in state waters is exempt from the possession limits specified in this section.

(c) *Mid-Atlantic Forage Species Management Unit*. The Mid-Atlantic Forage Species Management Unit is the area of the Atlantic Ocean that is bounded on the southeast by the outer limit of the U.S. EEZ; bounded on the south by 35°15.3' N. lat. (the approximate latitude of Cape Hatteras, NC); bounded on the west and north by the coastline of the United States; and bounded on the northeast by the following points, connected in the order listed by straight lines:

Point	Latitude	Longitude
1	40° 59.32' N	73° 39.62' W
2	40° 59.02' N	73° 39.41' W
3	40° 57.05' N	73° 36.78' W
4	40° 57.87' N	73° 32.85' W
5	40° 59.78' N	73° 23.70' W
6	41° 1.57' N	73° 15.00' W
7	41° 3.40' N	73° 6.10' W
8	41° 4.65' N	73° 0.00' W
9	41° 6.67' N	72° 50.00' W
10	41° 8.69' N	72° 40.00' W
11	41° 10.79' N	72° 29.45' W
12	41° 12.22' N	72° 22.25' W
13	41° 13.57' N	72° 15.38' W
14	41° 14.94' N	72° 8.35' W
15	41° 15.52' N	72° 5.41' W
16	41° 17.43' N	72° 1.18' W
17	41° 18.62' N	71° 55.80' W
18	41° 18.27' N	71° 54.47' W
19	41° 10.31' N	71° 46.44' W
20	41° 2.35' N	71° 38.43' W
21	40° 54.37' N	71° 30.45' W
22	40° 46.39' N	71° 22.51' W
23	40° 38.39' N	71° 14.60' W
24	40° 30.39' N	71° 6.72' W
25	40° 22.38' N	70° 58.87' W
26	40° 14.36' N	70° 51.05' W
27	40° 6.33' N	70° 43.27' W
28	39° 58.29' N	70° 35.51' W
29	39° 50.24' N	70° 27.78' W
30	39° 42.18' N	70° 20.09' W
31	39° 34.11' N	70° 12.42' W
32	39° 26.04' N	70° 4.78' W
33	39° 17.96' N	69° 57.18' W
34	39° 9.86' N	69° 49.6' W
35	39° 1.77' N	69° 42.05' W
36	38° 53.66' N	69° 34.53' W
37	38° 45.54' N	69° 27.03' W
38	38° 37.42' N	69° 19.57' W
39	38° 29.29' N	69° 12.13' W
40	38° 21.15' N	69° 4.73' W

41	38° 13.00' N	68° 57.35' W
42	38° 4.84' N	68° 49.99' W
43*	38° 2.21' N	68° 47.62' W

\* Point 43 falls on the U.S. EEZ.

(d) *Transiting*. Any vessel issued a valid permit in accordance with § 648.4 may transit the Mid-Atlantic Forage Species Management Unit, as defined in paragraph (c) of this section, with an amount of Mid-Atlantic forage species or Atlantic chub mackerel on board that exceeds the possession limits specified in paragraphs (a) and (b) of this section, respectively, to land in a port in a state that is outside of the Mid-Atlantic Forage Species Management Unit, provided that those species were harvested outside of the Mid-Atlantic Forage Species Management Unit and that all gear is stowed and not available for immediate use as defined in § 648.2. The transitting provisions specified in this paragraph (d) for a vessel possessing Atlantic chub mackerel are effective through December 31, 2020.

**§ 648.352 Mid-Atlantic forage species and Atlantic chub mackerel framework measures.**

(a) *General*. The MAFMC may, at any time, initiate action to add or revise management measures if it finds that action is necessary to meet or be consistent with the goals and objectives of the Atlantic Mackerel, Squid, and Butterfish FMP; the Atlantic Surfclam and Ocean Quahog FMP; the Summer Flounder, Scup, and Black Sea Bass FMP; the Atlantic Bluefish FMP; the Spiny Dogfish FMP; and Tilefish FMPs.

(b) *Adjustment process*. The MAFMC shall develop and analyze appropriate management actions over the span of at least two MAFMC meetings. The MAFMC must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to

comment on the proposed adjustment(s) at its first meeting, prior to its second meeting, and at its second meeting. The MAFMC's recommendations on adjustments or additions to management measures must come from one or more of the following categories: The list of Mid-Atlantic forage species, possession limits, annual landing limits, and any other measure currently included in the applicable FMPs specified in paragraph (a) of this section. Issues that require significant departures from previously contemplated measures or that are otherwise introducing new concepts may require an amendment of the FMPs instead of a framework adjustment.

(c) *MAFMC recommendation*. See § 648.110(a)(2).

(d) *NMFS action*. See § 648.110(a)(3).

(e) *Emergency actions*. See § 648.110(a)(4).

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